IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2) (b)

Description of Case

Criminal Appeal No.744 of 2001

Date of decision :- 10-08-2005

A.F.R. (Approved for Reporting)

~~Not approved for reporting~~

Date :- 10.08.2005 Initial of Judge

Note :- Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

HIGH COURT OF UTTARANCHAL, AT NAINITAL

CRIMINAL APPEAL NO. 744 of 2001
{Old No.1976 of 1984}

Sarafat S/o Sri Lalla Khan
R/o village Puranpur
P.S. Puranpur
District Pilibhit .....Appellant

Versus
State of Uttaranchal .....Respondent

Date :- 10th August, 2005

Mr. S.K. Mishra learned counsel fort the appellant
Sri D. K. Sharma learned G.A. assisted by Sri G.S. Sandhu learned G.A.

Hon'ble J.C.S. Rawat, J.

1. This a criminal appeal against the judgment and order dated 22.5.1984 passed by the Ist Addl. Sessions Judge, Nainital in S.T. No.79/1982, whereby the accused persons, namely Tara Chand, Sarafat-appellant and Bhagwan Dass were convicted under sections 366, 368, 376 I.P.C. and sentenced to undergo R.I. for a period of five years under each count. All the sentences would run concurrently.

2. The prosecution case in a nutshell is that two prosecutrix, who had been residing with their guardians in village Bagg No.54, P.S. Khatima, District Nainital, went for collecting fuel woods on 23.2.1982 at about, 12 noon. Some other villagers including Pooran Masi (PW-4) also went in the jungle for the said purpose. When they were returning with the fuel woods Forest Clerk Ram Gopal checked them and detained others but released the said prosecutrix and instructed them not to come again in the jungle for collecting the fuel woods. When they proceeded a little ahead, they were caught hold of by the accused persons and dragged

them into the jungle at the point of gun, tamancha and knife. In the night of 23.2.1982, the accused persons outraged their modesty. On 24.2.1982 and 25.2.1982 the prosecutrix were kept in the sugarcane field of

village Debipura and were ravished there also. In the morning of 26.2.1982 they saw some people of village Debipura near sugarcane filed they raised an alarm. Thereafter, the villagers came to them and the accused persons escaped from there. The prosecutrix were brought by the villagers to the village of Debipura and from there Khub Chand (PW-6) and one Madan Lal took them to their original village Nausar where they were given to their guardians. On 27.2.1982 Raghubir (PW-3) and Sudhi Ram-husband of Smt. Omwati lodged a report (Ex.ka.1) and the clothes of the prosecutrix were seized by the police vide seizure memo (Ex.ka.2). Both the prosecutrix i.e. PW1 & PW2 were medically examined on 28.2.1982 by Dr.(Smt.) Raj Laxmi Agarwal (PW-5) who prepared the report (Ex.ka.4) of PW1 and Ex.ka.5 of PW2. The FIR (Ex.ka.10) was lodged at the police station and entry to that effect was made in the G.D. (Ex.ka.11). The investigation was entrusted to Vikram Singh Bist-I.O. (PW-7), who prepared the site plan (Ex.ka.6) of the place from where the victims were kidnapped and Ex.ka.7 of the place form where the victims were recovered. The investigation was taken up as usual which culminated into the submission of the chargesheet (Ex.ka.8 & 9).

3. Chargesheet (Ex.ka.8) was framed against Tara Chand & Sarafat-appellant and Ex.ka.9 against Bhagwan Datt. They denied the charges and claimed the trial.

4. The prosecution in support of its case examined Smt. Omwati (PW1), Km. Indra (PW-2), Raghubir (PW-3), Pooran Masi (PW-4), Dr.(Smt.) Raj Laxmi Agarwal (PW-5), Khub Chand (PW-6) and Vikram Singh-I.O.(PW-7).

5. In the statement recorded u/s 313 Cr.P.C. the accused persons denied the prosecution case and stated that they have been falsely implicated in this case.

6. The learned trial court after appraisal of the evidence on record, accused Tara Chand, Sarafat and Bhagwan Dass were found guilty u/s 366, 368, 376 I.P.C. and convicted and sentenced them as mentioned above. The present appeal has been preferred by the appellant-Sarafat.

7. I have heard the learned counsel for the parties and perused the evidence on record.

8. The prosecution has produced the evidence of both the victims as P.W.1 and P.W.2 Both the victims narrated the prosecution case as stated above. The prosecution has also produced Pooran Masi PW4, who has stated that he alongwith the victims and some other villages went for collecting fuel woods on 23.2.1982 in the juggle. When they were returning with the fuel woods Forest Clerk Ram Gopal checked them and detained them, but the victims were released instructing them not to come again in the jungle for collecting the fuel woods. After about one hour the Forest Clerk also let off PW5 and other villagers. On being made enquiry by Raghubir PW-3 about the victims, Pooran Masi informed about the above fact.

Thereafter, they went to search out the victims. Khub Chand PW-6 has corroborated the factum of recovery of victims from the field of sugarcane of village Debipura. PW-6 has stated that when he alongwith some villagers came to the victims, the accused persons escaped from there. Khum Chand (PW-6) and one Madan Lal took the victims to their original village Nausar where they were given to their guardians.

9. It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. She stands on a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is physical as well as psychological and emotional. However, if the court on facts finds it difficult to accept the version of the prosecutrix on its face value, it may search fro evidence, direct or circumstantial which would lend assurance to her testimony. Assurance, short of corroboration, as understood in the context of an accomplice, would suffice.

10. Sexual violence apart from being a dehumanizing act is an unlawful intrusion on the right of privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self-esteem and dignity – it degrades and humiliates the victim and where the victim is a helpless innocent child or a minor, it leaves behind a traumatic experience. A rapist not only causes physical injuries but more indelibly reputation and not the least her chastity. Rape is not only a crime against the person of a woman, it is a

crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crisis. It is a crime against basic human rights. The courts are, therefore, expected to deal with cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely.

11. Now, I would like to discuss the respective contentions of the parties. The learned counsel for the

appellant contended that the identification parade was not held by the prosecution. It was further pointed out that the witnesses were not known to the victims and the accused persons at al prior to the incident. As such, the statements of the witnesses cannot be relied upon. The learned G.A. refuted the contentions. The victims had stated that the accused were calling to each other by name while the victims were with them. Khub Chand PW-6 has also sated that he knew the victims and the accused persons prior to the date of incident. As such, there was no need of identification parade in the matter. It is a well settled position of law that the substantive evidence of a witness is the statement in court but as a rule of prudence, earlier identification proceedings are held in order to corroborate the testimony of a witness given in the court as regards the identify of the accused who is not known to him from before**. {See Munna Vs. State (NCT of Delhi) 2004 SCC(Cri) p/944}.** The effect of identification parade has been recently examined by the three judges bench in **Malkhansingh & others Vs. State of M.P. 2003 SCC(Cri) p/1247,** in which the Hon'ble Supreme Court has held that:-

> *"7. it is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its*

very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed

by section 162 Cr.P.C. Failure to hold a test identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases, it may accept the evidence of identification even without insisting on corroboration.

10. It is no doubt true that much evidentiary value cannot be attached to the identification on the accused in court where identifying witness is a total stranger who had just a fleeting glimpse of the person identified or who had no particular reason to remember

the person concerned, if the identification is made for the first time in court.

16. It is well settled that the substantive evidence is the evidence of identification in court and the test identification parade provides corroboration to the identification of the witness in court, if required. However, what weight must be attached to the evidence of identification in court, which is not preceded by a test identification parade, is a matter for the courts of fact to examine. In the instant case, the courts below have concurrently found that the evidence of the prosecutrix to be reliable and, therefore, there was no need for the corroboration of her evidence in court has she was found to be implicitly reliable. We find no error in the reasoning of the courts below. From the facts of the case, it is quite apparent that the prosecutrix did not even know the appellants and did not make any effort to falsely

implicate them by naming them at any stage. The crime was perpetrated in broad daylight. The prosecutrix had sufficient opportunity to observe the features of the appellants who raped her on after the other. Before the rape was committed, she was again intimidated by the appellants. After the rape was committed, she was again threatened and intimidated by them. All this must have taken time. ***This is not a case where the identifying witness had only a fleeting glimpse of the appellants on a dark night.*** *She also had a reason to remember their faces as they had committed a heinous offence and put her to shame. She had,*

therefore, abundant opportunity to notice their features. In fact on account of her traumatic and tragic experience, the faces of the appellants must have got imprinted in her memory, and there was no chance of her making a mistake about their identify. The prosecutrix appears to be a witness on whom implicit reliance can be placed and there is no reason why she should falsely identify the appellants as the perpetrators of the crime if they had not actually committed the offence. In these circumstances if the courts below have concurrently held that the identification of the appellants by the prosecutrix in court does not require further corroboration, we find no reason to interfere with the finding recorded by the courts below after an appreciation of the evidence on record."

12. From the facts of the instant case, it is quite apparent that both the prosecutrix did not even know the accused persons and id not make any effort to falsely implicate them by naming them at any stage. The offence was committed in broad daylight as well as in the night. Before committing the rape the victims were threatened and beaten by 'lathi'. The victims were remained with the accused persons for about three days. Thus, both the prosecutrix had sufficient raped them. This is not a case where the identifying witnesses had only a fleeting glimpse of the accused. The victims had a reason to remember the faces of the accused as they had committed a heinous offence and must have got imprinted in their memory. There was no chance of making a mistake about their identity.

They had ample opportunity to identify the accused. They identified the accused in the court.

13. It is unfortunate that despite the aforesaid facts, the test identification parade was not held. The identification of the accused either in test identification parade or in court is not a sine qua non in every case if from the circumstances the guilt is otherwise established. Many a time, crimes are committed under the cover of darkness when none is able to identify the accused. The commission of a crime can be proved also by circumstantial evidence. In the present case, there are clinching circumstances unerringly pointing out the accusing finger towards the accused beyond

any reasonable doubt. Before I notice the circumstances proving the case against the accused and establishing their identity beyond reasonable doubt, it has to be borne in mind that the approach required to be dealt with utmost sensitivity. The courts have to show greater responsibility when trying an accused on charge of rape. In such cases, the broader probabilities are required to be examined and the courts are not to get swayed by minor contradictions or insignificant discrepancies which are not of substantial character. The evidence is required to be appreciated having regard to the background of the entire case and not in isolation. The ground realities are to be kept in view. The failure to conduct the identification parade is a defect of the investigation and it is the remissness on the part of the I.O. It is also required to be kept in view that every defective investigation need not necessarily result n the acquittal. To do so would tantamount to playing into the hands of the

investigating officer if the investigation designedly defective. In defective investigation, the only requirement is of extra caution by courts while evaluating evidence. It would not be just to acquit the accused solely as a result of defective investigation. Any deficiency or irregularity in investigation need not necessarily lead to rejection of the case of prosecution when it is otherwise proved**. {Visveswaran Vs. State 2003 S.C.C. (Cri) p/1270}.** In view of the above discussion, I do not find any weight in the contention of the learned counsel for the appellant.

14. The learned counsel for the appellant further contended that due to enmity the appellant was falsely implicated in this case. The learned G.A. refuted the

contention and contended that P.W.1 had stated that she did not know the accused persons prior to the incident. The record reveals that there is no evidence of enmity in between the accused persons and the victims. For the sake of argument if there is enmity between the parties no woman would like to say falsely that her supreme honour and dignity has been robbed by committing the rape on her.

15. The learned counsel for the appellant further contended that there are major contradictions and exaggerations and embellishments in the testimony of the witnesses. The learned counsel for the appellant further contended that PW-1 stated that Sarafat was armed with gun and Bhagwan Dass with tamancha, whereas the PW2 stated that Sarafat was armed with tamancha and Bhagwan Dass with gun. PW-2 has stated in her evidence that she was dragged through the matter. The observation differs form person to person and what one may notice, another may not. An object or moment might emboss its imagine on one

person’s mind whereas it might go unnoticed on the part of another. By and large the people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape-recorder. The witness cannot be expected to pose a photographic memory and to recall the details of an incident. Ordinarily if so happens that witness is overtaken by the events, the witness could not have anticipated the occurrence, which so after has an element of surprise. Ordinarily a witness cannot be

expected to recall accurately the sequences of events, which took place in a rapid succession or in a short time of span. A witness is likely to get confused or mixed up when interrogated, later on. As the person who has witnessed an incident, like the present one reacts in his own way. Some are sunned, some become speechless and some stand uprooted from the spot. Thus every individual reacts on his own way. There is no set of rules of natural reaction.

16. If the contradictions do not affect the prosecution story, the court should not take into account such discrepancies, which are bound to come on the testimonies. The discrepancies as pointed out by the learned counsel fort he appellants are not of such consequences, which can be named on the shoulders of the prosecution. The court is within its jurisdiction being the first appellate court to reappraise the evidence, but he discrepancies found in the ocular account of two witnesses unless they are so vital, cannot affect the credibility of the evidence of the witnesses. There are bound to be some discrepancies between the narrations of different witnesses when they speak on details, and unless the contradictions are

of a material dimension, the same should not be used to jettison the evidence in its entirety. Incidentally, corroboration of evidence with mathematical niceties cannot be expected in criminal cases. Minor embellishment, there may be, but variations by reason therefore should not render the evidence of eyewitnesses unbelievable. Trivial discrepancies ought not be obliterate an otherwise acceptable evidence. **{See Leela Ram Vs. State of Haryana 2000 SCC(Cri) p/222}.** It has also been held that the Court should have to bear in mind that different witnesses

react differently under different situations: whereas some become speechless, some start waling while some others run away from the scene and yet there are some who may come forward with courage, conviction and belief that the wrong should be remedied. There cannot be any set pattern or uniform rule of human reaction and to discard a piece of evidence on the ground of his reaction not falling within a set pattern is unproductive and a pedantic exercise.

17. The learned counsel for the appellant further contended that the victims were missing from their residence from 23.2.1982, but no missing report was lodged at the police state. Even, the victims met with the villagers at about 9AM on 26.2.2005, but the report was not lodged by the villagers on the same day. The victims were handed over to their guardians at about 4PM on 26.7.2005 and the report to that effect was lodged on the next day. As such, the prosecution has failed to report the matter immediately after the incident. Therefore, the appellant is entitled to be acquitted on this score alone. The learned G.A. refuted the contention and contended that it is an offence against the woman in which the sexual violence has been committed. One of the prosecutrix was married

woman and the other was minor girl aged about 15-16 years. In India if the prosecutrix happened to be a married person, she will not do anything without informing her husband. If the prosecutrix is minor, she will not do anything without the consent of her father. Merely because the complaint was lodged less than promptly, does not raise the question that the complaint was false. The reluctance to go to the police is because of society's attitude towards such women.

It casts doubt and shame upon her rather than comfort and sympathy. Therefore, the delay in lodging the FIR in such cases does not necessarily indicate that their version is false. **{Sri Narayan Saha Vs. State of Tripura 2005 S.C.C. (Cri) 410}.** In the instant case, the victims were recovered on 26.2.1982 and the report was lodged on 27.2.1982. The victim were handed over to their guardians at about 4PM on 26.7.2005 and the police station was 14 KM away from the place of occurrence. As such, the delay in lodging the FIR is explained. It has been held in **State of H.P. Vs. Shree Kant Shekari 2005 S.C.C. (Cri) p/327 and Tulshidas Kanolkar Vs. State of Goa 2004 S.C.C.(Cri) p/44** that the unusual circumstances satisfactorily explained the delay in lodging the FIR. In any event, delay per se is not a mitigating circumstance for the accused when accusations of rape are involved. Delay in lodging the FIR cannot be used as a ritualistic formula for discarding the prosecution case and doubting its authenticity. It only puts the court on guard to search for an consider if any explanation has been offered for the delay. It has also been held in **Munshi Prasad Vs. State of Bihar 2002 S.C.C.(Cri) p/175** that mere delay in filing the FIR cannot be said to be fatal to a criminal prosecution. FIR cannot but be termed to be starting point and thus sets in motion a criminal investigation. Strictly

speaking it is of no consequence in the event the FIR has been delayed with a plausible explanation though on the factual score it is not even so. In view of the above, the contention with regard to the delay in lodging the FIR is not tenable.

19. The learned counsel for the appellant further tried to point out that the victims were the consenting party. Though, this suggestion has been put during the cross-examination before the trial court. Out of the two prosecutrix, one victim was minor and her consent is immaterial. The plea of consent is too shallow to even need detailed analysis or consideration. A minor girl cannot legally give a consent which would necessarily involve understanding of the effect of such consent. It has to be a conscious and voluntary act. There is a gulf of difference between consent and submission. Every consent involves a submission but the converse does not follow, and mere act of submission does not involve consent. An act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance or passive giving in when the faculty is either clouded by fear or vitiated by duress or impaired due to deficiency cannot be considered to be consent as understood in law. For constituting consent, there must be exercise of intelligence based on the knowledge of the significance and the moral effect of the act. **{Tulshidas Kanolkar Vs. State of Goa 2004 S.C.C. (Cri) p/44}.** In the instant case, the faculty of the victims was clouded by fear and duress. Therefore, the contention with regard to the consent is not tenable.

19. The learned counsel for the appellant further contended that the medical report does not prove the factum of rape. As such, the appellant is entitled to be

acquitted on this point alone. The learned G.A. refuted the contention. It has been held in **Sri Narayan Saha & another Vs. State of Tripura 2005 S.C.C. (Cri) p/410** that:-

> *"9. Coming to the doctor's evidence, it was categorically stated by him that there was profuse bleeding which rendered any definite opinion difficult. That really is of no consequence in view of the unimpeached evidence of the victim PW3."*

20. Even assuming that the PW-1 was previously accustomed to sexual intercourse, that is not a determinative question. On the contrary, the question which was required to be adjudicated was did the accused commit rape on the victim on the occasion complained of. Even if it is hypothetically accepted that the victim had lost her virginity earlier, it did not and cannot in law give licence to any person to rape her. **{State of U.P. Vs. Pappu alias Yunus & another 2005 S.C.C. (Cri) p/780}.** It is also established by the medical evidence that the virginity of the minor was lost. The other victim was a married woman. Moreover, the testimony of the victims is unimpeachable and nothing could be elicited from it. Therefore, the contention of the learned counsel for the appellant is not tenable.

21. Lastly, the learned counsel for the appellant contended that there was enmity between the accused and the prosecution witnesses. The learned G.A. refuted the contention. PW-6 has specifically denied that there was enmity between Bhagwan Dass and his father. PW-6 has categorically stated as follows:-

*;g dguk xyr gS fd esjs firkth ds dRy ds dsl es Hkxoku nkl iSjoh dk xokg jgk gks vkSj ;g Hkh xyr gS fd geus blls xokgh ds fy, dgk gks^^*

22. The aforesaid fact cannot give a rise to falsely implicate the accused person in a case life 376 I.P.C. Moreover, no women will come foreword to say that the sexual violence has been committed upon her simply to falsely implicate the appellant. This fact also corroborates the factum of rape.

23. In view of the above discussion I am of the view that the prosecution has established the guilt beyond any reasonable doubt against the appellant. I find that the learned trial court has rightly convicted and sentenced the appellant and there is no infirmity in the judgment passed by the trial court. Hence, the appeal is dismissed and the conviction and sentence awarded by the Trial court are confirmed.

24. Let the lower court record be sent back to the court concerned for compliance. Compliance report be submitted within three months.

(J.C.S. RAWAT, J.)

Dated 10.8.2005

LSR